SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 660

KENNETH JACOBS, FLORENCE KARPF
and JONAS MEKAS,
Appellants,

v.

PEOPLE OF THE STATE OF NEW YORK,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK,
APPELLATE TERM, FIRST JUDICIAL DEPARTMENT

APPELLANTS' REPLY TO MOTION TO DISMISS OR AFFIRM

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Pursuant to Rule 16(3) of the Revised Rules of the Supreme Court of the United States, appellants submit this brief in reply to the motion of the appellee to dismiss this appeal on the grounds that the appeal is moot and does not present a substantial federal question.

POINT I

The appeal is not moot.

Appellee contends that this appeal should be dismissed as moot since appellants received suspended sentences. Such a proposition is supported neither by reason, justice or precedent. First, precedent supports appellants' right to have their criminal conviction reviewed by this Court.

Mishkin v. *New York*, 383 U. S. 502 (1966) (Court's Opinion, ftn. 3); *Wetzel* v. *Ohio*, 371 U. S. 65 (1962); *Pollard* v. *U. S.*, 352 U. S. 354 (1957); *U. S.* v. *Morgan*, 346 U. S. 502 (1953); *Fishwick* v. *U. S.*, 329 U. S. 211 (1946); and *Redrup* v. *New York*, #3 Oct. 1966 Term. Furthermore, it is evident that all manner of "penalties or disabilities" flow from this judgment of conviction under New York law.

For example, the conviction herein will result in a deprivation of the appellants' property rights in the film print and the motion picture equipment seized at the time of appellants' arrest. Under Article 71 of the Civil Practice Law and Rules of New York, all of the appellants because of their superior possessory interests will at the conclusion of this proceeding be entitled to bring an action to recover possession of the film and the equipment.* 13 Carmody-Wait, *Cyclopedia of New York Practice, Replevin*, § 26; 7B McKinney's New York Laws, *CPLR 7101-Practice Commentary* at pp. 385-87. Nevertheless, were the conviction here permitted to stand, the holding that the film was obscene would by implication remain unchallenged and the film and the equipment will be subject to forfeiture. *Penal Law*, § 1141-c; Code of Criminal Procedure, § 22-a. Thus, appellants' pecuniary interest in the outcome of this litigation established their right to have convicitions reviewed by the Court. *Wetzel* v. *Ohio, supra.*

A more collateral effect, but a more likely source of adverse consequences to appellants is the Administrative Code of the City of New York. The Code sets up an entire system of licensing procedures for motion pictures. Chap. 32, Title B. The Code specifically provides that the Depart-

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* The film print and the equipment are owned by the Film Makers' Cooperative, which is a non-profit membership corporation under New York law. Since all of the appellants are members of the Cooperative, they have a direct financial interest in the property. *Membership Corporation Law*, § 55.

ment of Licenses shall assure that the motion picture theatres are not conducted in a manner offensive to "public morals". § B32-26.0. Under this section the Department of Licenses has attempted to revoke motion picture theatre licenses on the claim that obscene pictures have been shown. § B32-6.0. Since appellants have been and are still deeply involved in the showing of motion pictures in New York City, the upholding of their conviction on the grounds of showing an obscene film may well be used as a basis to deprive them of the right to continue to show motion pictures at theatres operated or leased by their organization, the Film Makers Cooperative or by themselves personally. § B32-6.0.

Finally, appellants would urge this Court that their interest in removing the stain which a criminal conviction inevitably imposes upon anyone, gives them an interest of sufficient weight so as to permit them the right to assert that their convictions were constitutionally defective and in violation of their rights under the First Amendment. In *Wetzel* v. *Ohio*, this Court held that a few hundred dollars costs assessed against the estate of a deceased defendant entitled his estate to continue to prosecute the appeal from the decedent's criminal conviction. So, too, the possible loss of a nominal amount of money by a criminal defendant either in the form of a fine or costs constitutes a "case or controversy" that permits this Court to review his criminal conviction., *Peterson* v. *Greenville*, 373 U. S. 244 (1963); *Wright* v. *Georgia*, 373 U. S. 284 (1963). It is difficult to understand the argument that the imposition of a nominal fine is sufficient to invoke this Court's jurisdiction, while the removal of a stigma of a criminal conviction should not be recognized as a sufficient ground for obtaining appellate review by the Court of the grave constitutional questions raised by the appellants' conviction. Moreover, since habeas corpus is not available to a defendant receiving a suspended sentence, only by direct review

of his conviction by this Court can he obtain a hearing in a federal court of his claim that his First Amendment rights have been violated by his conviction.

POINT II

Appellee's argument demonstrates that this appeal presents substantial federal questions.

The discussion in appellee's brief of the various issues raised by the Jurisdictional Statement only reinforces appellants' contention that substantial federal questions are presented by this appeal. Two examples will suffice. On the issue of *scienter*, it is pointed out that this very issue is presently before the Court in the case of *Redrup* v. *New York*, No. 3 Oct. 1966 Term. Otherwise, the argument only points out the gravity of the threat to First Amendment rights posed by the lack of a defense of "honest mistake". The alleged difficulties raised by such a defense are easily solved when it is recognized that such a defense would pose no more difficulty than any fact question. A claim of "honest mistake" would be negated where there is evidence of a commercial exploitation of sex as in *Mishkin* v. *New York*, 383 U. S. 502 (1966). Not only is any evidence of commercial exploitation wholly absent here, but the opposite is established by the record.

The appellants considered the film as well as the many other films produced by the members of Film Makers Cooperative as works of art, treated them as such and expected others to do likewise (238-39; 255, 257-58). Consequently, the question of *scienter* is directly involved here where appellants were sincerely engaged in a legitimate artistic activity. Yet their conduct was held to be criminal. Appellants contend therefore that their convictions violate their First Amendment rights.

Appellee also correctly acknowledges that the Court has agreed to review the issue of what proof must be offered

by the State in an obscenity case. *Phelper* v. *Decker*, #374 Oct. 1966 Term.

Appellants will not repeat the arguments previously discussed in their Jurisdictional Statement. Two comments on Appellee's motion are however clearly required. First, Appellee argues that the film has "no possible social or artistic value". That basis of this wholly subjective statement is unsupported by any proof in the record since Appellee offered none. On the other hand, where appellants proffered evidence that many persons active in the arts and the cinema believe "Flaming Creatures" to be a work of clear artistic merit and, moreover, totally devoid of erotic or prurient appeal, the offer was rejected. The fact that judges or attorneys are permitted to substitute personal beliefs for evidence in a court of law only substantiates the validity of appellants' claim of constitutional error in the Trial Court's exclusion of the proffered evidence. The threat to First Amendment rights inherent in a rule which permits the Trial Court to take judicial notice of the issue of obscenity is revealed by appellee's conclusory statements concerning the film.

Second, there is a clear misstatement of the record in appellee's brief. The brief states that appellants' offers of proof on the issue of the film's redeeming social importance were properly excluded on the technical grounds that the witnesses were not asked for "critical evaluation of the artistic content of the film" (Appellee's Brief, p. 11). The record clearly indicates that the basis for the objection to appellants' offer of proof was that the defendant objected "to any line of questioning dealing with a question of artistic merit or community standards" (R. 135-36). Moreover, all technical objections were specifically waived (R. 152, 158-162). Under New York law, a specific objection to evidence which is then excluded can be sustained on appeal only on that basis. *Bloodgood* v. *Lynch*,

293 N. Y. 308; *People* v. *Weinberger*, 239 N. Y. 307; *Touley* v. *Bacon*, 70 N. Y. 34.

The belated attempt to justify the exclusion of expert testimony on the basis of an objection to the form of questions is not only a complete distortion of the record, but it also is an implicit admission of error in the rulings below. Moreover, the reason that appellee now gives for accepting the written review was not the one offered by appellee at the trial. As noted above, there the appellee argued that the Court should reject all oral expert testimony on the issue (R. 161-62). The basis for its position is difficult to fathom, but necessarily cannot be accepted especially where, as here, we are dealing with new works of art that have had limited exposure and thus have not had any substantial opportunity for critical comment to be published. In any event, the record clearly indicates that appellants' witnesses were quite prepared to discuss the film's artistic content in great detail, but the Trial Court's ruling excluded such proof.

CONCLUSION

The motion to dismiss the appeal or affirm the judgment below should be denied. The Court should note probable jurisdiction and reverse the judgment below.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

JACOBS ET AL. *v.* NEW YORK.

APPEAL FROM THE APPELLATE TERM OF SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT.

No. 660. Decided June 12, 1967.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed as moot.

MR. JUSTICE BRENNAN would affirm the judgment of the lower court.

MR. JUSTICE FORTAS would reverse the judgment of the lower court.

MR. CHIEF JUSTICE WARREN, dissenting.

I dissent from the Court's dismissal of this appeal as moot. These appellants were convicted by a three-judge bench of the Criminal Court of New York City of violating § 1141 of the Penal Law of New York, which provides in pertinent part:

> "1. A person who sells, lends, gives away, distributes, shows or transmutes . . . any obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic . . . motion picture film . . . which may or may not require mechanical or other means to be transmuted into auditory, visual or sensory representations of such character . . . .
>
> "2. Is guilty of a misdemeanor, and, upon conviction, shall be sentenced to not less than ten days nor more than one year imprisonment. . . ."

On August 7, 1964, appellants Jacobs and Mekas were sentenced to 60 days in the New York City Workhouse,

with execution of the sentence suspended. Appellant Karpf received a suspended sentence.

In dismissing this appeal for mootness, the Court apparently bases its action upon the fact that under New York law, the maximum time during which appellants could have had their suspended sentences revoked and replaced by prison sentences was one year from the date of the original sentences. N. Y. Code Crim. Proc. § 470-a. The State argues that this appeal is moot because more than one year has run from August 7, 1964, and appellants are under no present threat of imprisonment. Moreover, the State contends that neither New York law nor federal law imposes any further penalty for conviction of the misdemeanor involved in this case.

I cannot accept this argument. The practical result of the Court's willingness to dismiss this appeal as moot is that States may insulate their convictions under laws raising constitutional questions from review on the merits by this Court by the simple expedient of a suspended sentence where a time limit for the imposition of an executed sentence is short enough to run before an appeal can be taken to this Court. A State could thus keep a person under continual threat of imprisonment without review by this Court of any constitutional objections to his convictions by a continued series of convictions and suspended sentences. By the time any single conviction could be brought to this Court, the defendant's jeopardy under that particular sentence would be concluded. However, the defendant could still be oppressed by subsequent suspended sentences which would themselves be unreviewable by the time the defendant could bring his case to this Court. I cannot agree that the commands of the United States Constitution can be this easily suspended by the States. Moreover, this power, which under this dismissal can

be exercised without constitutional restraint, gives the State a weapon which might in some cases be used to suppress constitutionally protected conduct. After a person has been convicted under a statute which limits his right of expression, his subsequent conduct will be significantly chilled by the conviction on his record. Particularly where, as in this case, the conviction stems from conduct which is directly in line with appellants' profession as movie exhibitors, they may justifiably fear that any future conduct running the danger of infringing the statute will be more harshly treated because of the previous unreviewed conviction. Who can doubt that a judge's reaction to another conviction under § 1141 of the New York Penal Law would not be colored by the fact of a prior conviction? For example, these appellants argue in this case that they should not be constitutionally convicted because their conduct demonstrates their good-faith belief that they were not exhibiting obscene material. They may have felt that even if a state judge did not accept their constitutional argument based on their good faith, he might at least give the appellants the most lenient sentence. However, once they have been convicted and have been unable to have the constitutionality of the conviction passed upon by this Court, their situation is radically different. Even if they have been convicted of engaging in what this Court might finally determine to be constitutionally protected conduct, they are likely to order their future conduct on the basis of the assumed validity of previous conviction. When we are dealing with First Amendment freedoms, freedoms we have held require breathing space to survive, see *New York Times* v. *Sullivan*, 376 U. S. 254 (1964), *NAACP* v. *Button*, 371 U. S. 415 (1963), we should be extremely slow to accept mootness doctrines which grant the States an unreviewable power to suppress modes of expression.

I believe the Court is straining the mootness doctrine and in doing so is bypassing important constitutional questions in the obscenity area which this Court has an obligation to decide. In this case, we are presented with an opportunity for injecting some clarity into the problem of what constitutes obscenity, a problem which has become increasingly muddled and difficult for the federal and state courts and legislatures to understand since we first defined the reach of the First Amendment in this area in *Roth* v. *United States*, 354 U. S. 476 (1957). The questions presented are not easy, but I am sure that it is our constitutional duty to grapple with them and to present to the country an understandable statement of how far the First Amendment restricts legislative attempts to control obscene material. Similarly, the Court dismisses as moot the appeal in No. 993, *Tannenbaum* v. *New York*, because a jail sentence was suspended and a fine has been paid. That case raises the important question never addressed by this Court of the constitutionality of "variable obscenity" laws which restrict the sale of obscene materials to minors on the basis of definitions of obscenity drawn expressly with minors in mind. While I do not express a view as to the merits of this question, I think the great importance of the question to the Nation, and the responsibility of this Court to elaborate the scope and meaning of the First Amendment, should require the Court to note jurisdiction and hear the case on the merits. A similar strained conception of mootness resulting in a failure of decision on the merits recalls the Court's avoidance of a constitutional decision in the short *per curiam* in *Parker* v. *Ellis*, 362 U. S. 574 (1960). I expressed the belief in that case, which I reaffirm here, that this Court has an obligation to decide, and not avoid, important constitutional questions which are concretely presented to it by litigants having adverse interests. If Congress had intended for our jurisdiction to be discretionary in all cases, it would not have differ-

entiated in the statutes defining our appellate jurisdiction between appeals and writs of certiorari.

As MR. JUSTICE DOUGLAS points out in his dissent to the dismissal for mootness in this case, there are additional reasons why this case should not be deemed moot. Appellants' film and equipment were seized by the police at the time of their arrests. Of course, if appellants were not convicted, or if their convictions were reversed, they would be entitled under state law to the return of their property. On the other hand, our dismissal leaves these convictions unchallenged, and appellants' film and equipment will be subject to forfeiture. New York Penal Law § 1141–c, N. Y. Code Crim. Proc. § 22–a. Thus, appellants have a clear pecuniary interest in the outcome of this appeal. Appellants also point to the likelihood that these convictions will impair their ability to secure a license to operate a motion picture theatre. Under the Administrative Code of the City of New York, which establishes a comprehensive system of licensing procedures, the Department of Licenses is charged with assuring that motion picture theatres are not offensive to "public morals." § B32–26.0. These convictions will surely affect appellants' ability to procure a license to exhibit motion pictures in the future.

Since I believe this appeal cannot be dismissed as moot, I believe the Court must consider the case on the merits. I am satisfied that these convictions should be affirmed. Under the standards set out by the Court in *Roth* v. *United States*, 354 U. S. 476 (1957), this film is not within the protections of the First Amendment. We formulated the test in that case as being whether the material was utterly without social value, whether it went substantially beyond customary limits of candor in representing sexual matters, and whether "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests." *Supra*, at 489. This film falls out-

side the range of expression protected by the First Amendment according to the criteria set out in *Roth*.

For the reasons I have given, I would consider this appeal on the merits and I would affirm this conviction.

MR. JUSTICE DOUGLAS, dissenting.

We have here two cases in which appellants have been convicted under a State's obscenity statutes. In No. 660, appellants were convicted of showing an allegedly obscene motion picture. They were given suspended sentences and the time during which the suspended sentences could have been revoked and prison sentences imposed has now passed. In No. 993, appellant was convicted of selling an allegedly obscene magazine to a person under 18. He was sentenced to 30 days and fined $100. The fine has been paid and the sentence was suspended. The First Amendment issues in these cases are substantial. Nonetheless, they are dismissed as moot because the appellants are no longer subject to the custody of the State and in No. 933 the fine has been paid. The Court apparently believes this result to be commanded by our prior cases. I disagree.

The mootness doctrine is expressive of the need for antagonistic parties whose vigorous argument will sharpen the issues. It is part of the "case or controversy" requirement of Article III. *St. Pierre* v. *United States*, 319 U. S. 41, 42. But it is not so rigid as to defeat substantial rights, nor so inflexible as to prevent this Court from facing serious constitutional questions. Thus, we have held that service of a sentence does not render a case moot where the conviction, if allowed to stand, will result in collateral disabilities such as a loss of civil rights. *Fiswick* v. *United States*, 329 U. S. 211; *United States* v. *Morgan*, 346 U. S. 502.

In the present cases, we are in the area of the First Amendment. Over and over again we have stressed that First Amendment rights need "breathing space to survive" (*NAACP* v. *Button*, 371 U. S. 415, 433); and we

have been watchful lest coercive measures exercise an *in terrorem* effect which intimidates people from exercising their First Amendment rights. See, *e. g.*, *Speiser* v. *Randall*, 357 U. S. 513; *NAACP* v. *Button*, *supra*; *Keyishian* v. *Board of Regents*, — U. S. —. We have been mindful that "[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions." *NAACP* v. *Button*, *supra*, at 433. Accordingly, we have modified traditional rules of standing and prematurity to fit the peculiarities necessary to ensure adequate protection to First Amendment rights. See *Dombrowski* v. *Pfister*, 380 U. S. 479.

The *in terrorem* effect of denying review to cases such as these because sentences have been suspended or short sentences served is obvious. Sentences for violations of obscenity statutes are often suspended and generally short. If those convicted cannot obtain ultimate review of such convictions, merely because of the shortness of the sentence and the slowness of the judicial process, many will choose to comply with what may be an invalid statute. Many may steer wide and refrain from showing or selling protected material. First Amendment rights are thus stifled. If a practice such as this were shown to exist, its *in terrorem* effect on all publishers would certainly be sufficiently clear as to give any of them standing to bring an action for declaratory relief. Its *in terrorem* effect on a publisher who has actually felt the harsh impact of the law is so obvious that its continuing deterrent effect upon him should keep his case from becoming moot.

In No. 660, appellants' film and motion picture equipment were seized at the time of their arrest. They argue that at the conclusion of this proceeding they can bring an action to recover possession of the film and equipment. If their convictions are allowed to stand, along with the holding that the film is obscene, the film will be subject to forfeiture. They also argue that the department of licenses may suspend their motion picture theater license

on the ground that they have shown obscene pictures. Perhaps they could relitigate the question of the film's obscenity in such proceedings. That is, of course, a matter of state law. But if appellants are correct, the convictions may entail sufficient collateral consequences that distinguish them from *St. Pierre* v. *United States, supra,* and bring them within the *Fiswick* and *Morgan* cases.

The questions of mootness loom so large in the setting of the First Amendment that they should at least be briefed and argued.

END